



## Department of Health

ANDREW M. CUOMO  
Governor

HOWARD A. ZUCKER, M.D., J.D.  
Commissioner

SALLY DRESLIN, M.S., R.N.  
Executive Deputy Commissioner

August 17, 2016

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Daniel Guenzburger, Esq.  
NYS Department of Health  
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New York, New York 10007

Benjamin Xue, Esq.  
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1001 Avenue of the Americas - 11<sup>th</sup> Floor  
New York, New York 10018

Fung Michael Ngan, M.D.  
17 East Broadway  
New York, New York 10002

Fung Michael Ngan, M.D.  


**RE: In the Matter of Fung Michael Ngan, M.D.**

Dear Parties:

Enclosed please find the Determination and Order (No.16-285) of the Professional Medical Conduct Administrative Review Board in the above referenced matter. This Determination and Order shall be deemed effective upon receipt or seven (7) days after mailing by certified mail as per the provisions of §230, subdivision 10, paragraph (h) of the New York State Public Health Law.

Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either certified mail or in person to:

Office of Professional Medical Conduct  
New York State Department of Health  
Riverview Center  
150 Broadway – Suite 355  
Albany, New York 12204

If your license or registration certificate is lost, misplaced or its whereabouts is otherwise unknown, you shall submit an affidavit to that effect. If subsequently you locate the requested items, they must then be delivered to the Office of Professional Medical Conduct in the manner noted above.

This exhausts all administrative remedies in this matter [PHL §230-c(5)].

Sincerely,



James F. Moran  
Chief Administrative Law Judge  
Bureau of Adjudication

JFH:nm  
Enclosure

**STATE OF NEW YORK : DEPARTMENT OF HEALTH  
ADMINISTRATIVE REVIEW BOARD FOR PROFESSIONAL MEDICAL CONDUCT**

**COPY**

In the Matter of

**Fung Michael Ngan, M.D. (Respondent)**

**Administrative Review Board (ARB)**

**A proceeding to review a Determination by a Committee  
(Committee) from the Board for Professional Medical  
Conduct (BPMC)**

**Determination and Order No. 16-285**

**Before ARB Members D'Anna, Koenig, Grabioc, Wilson and Milone  
Administrative Law Judge James F. Horan drafted the Determination**

**For the Department of Health (Petitioner): Daniel Guenzburger, Esq.  
For the Respondent: Pro Se**

After a hearing below, a Committee found that the Respondent failed to follow Federal Law governing medical practice and failed to maintain medical records in the Respondent's practice as a Civil Surgeon for the United States Customs and Immigration Service (USCIS). The Committee voted to ban the Respondent from employment with the USCIS and the Committee ordered that the Respondent to complete a continuing education course in medical record keeping. In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2016), both parties ask the ARB to nullify or modify the Committee's Determination. Upon considering the hearing record and the parties' review submissions, the ARB affirms the Committee's Determination on the charges and we affirm the Committee's Order that the Respondent complete a record keeping course. We overturn the ban on USCIS employment. We vote to suspend the Respondent's license to practice medicine in New York State for three months, we stay the suspension in full and we place the Respondent on probation for three years under the terms that appear as the Appendix to this Determination.

### Committee Determination on the Charges

The Committee conducted a hearing into charges that the Respondent violated New York Education Law (EL) §§ 6530(2-3), 6530(5), 6530(16), 6530(21) & 6530(32)(McKinney Supp. 2016) by committing professional misconduct under the following specifications:

- practicing medicine fraudulently,
- practicing medicine with negligence on more than one occasion,
- practicing medicine with incompetence on more than one occasion,
- failing to comply with Federal law governing the practice of medicine,
- willfully filing a false report, and,
- failing to maintain medical records for six years for each patient which accurately reflect the evaluation and treatment of the patient.

The charges involved tests which the Respondent administered to twelve persons (Patients A to L) during the Respondent's service as a Civil Surgeon under designation from the USCIS.

The Committee determined that the Respondent's work as a Civil Surgeon involved conducting medical evaluations on immigrant applicants, primarily screening for contagious diseases such as tuberculosis (TB). The Respondent evaluated Patients A-J, all immigrants from China, for TB using the Mantoux Tuberculin Skin Test (Test). The Test injects a small amount of TB protein into a patient's arm and the patient returns for evaluation in 48 to 72 hours. The reaction to the test is an induration which is a palpable, raised, hardened area on the skin. The size of the reaction determines whether further testing occurs. The United States Center for Disease Control (CDC) technical instructions require Civil Surgeons to report the size of TB reactions on a form. The USCIS requires immigrant applicants with a TB reaction of more than 5 millimeters (MM) in size to undergo further testing, including x-rays. The Respondent testified at hearing that he reported all reactions below 10 MM as a "0", because the International standard for TB testing considers a reaction as positive for TB at 10 MM and above. The Respondent also conceded that he kept USCIS records for only one year and that on at least one occasion he failed to note relevant patient history.

The Committee found that the Respondent violated EL § 6530(16) by willfully failing to comply with Federal law governing the practice of medicine and that the Respondent violated EL § 6530(32) by failing to maintain accurate patient records. The Committee dismissed all other charges. The Committee rejected the Petitioner's request that the Committee revoke the Respondent's License, because the Committee found revocation to be an overly harsh penalty for the Respondent's misconduct. The Committee directed that the Respondent complete successfully a continuing medical education course in record keeping and the Committee limited the Respondent's License to prohibit him from participating in the USCIS Civil Surgeon Program.

#### Review History and Issues

The Committee rendered their Determination on April 26, 2016. This proceeding commenced on May 4, 2016, when the ARB received the Petitioner's Notice requesting a Review. The ARB received the Respondent's brief on May 6, 2016. The record for review contained the Committee's Determination, the hearing record and the parties' submissions. After the parties filed their review Notices, the Administrative Officer of the ARB advised the parties by letter on May 12, 2016 that briefs would be due June 6<sup>th</sup>. The Petitioner requested an extension until June 13<sup>th</sup>. The ALJ answered that he could only grant an extension to June 10, so that parties could file any reply briefs by June 17<sup>th</sup>. Both parties submitted briefs by June 10<sup>th</sup> and the Respondent submitted his reply on June 16<sup>th</sup>. The Petitioner submitted no reply until June 20<sup>th</sup>, to which the Respondent objected. The ARB conducted deliberations in this matter on June 21, 2016.

The Petitioner argued that the Committee erred in dismissing the fraud, false reporting and negligence charges. The Petitioner argued further that the Committee imposed an

inappropriate sanction. The Petitioner asked that the ARB revoke the Respondent's License. In the alternative, the Petitioner asked that, if the ARB sustains the fraud/false reporting charges, the ARB impose a substantial period of actual License suspension. The Petitioner also faulted the Committee for failing to explain the rationale for dismissal of substantial charges.

The Respondent's brief described the USCIS 5 MM cut-off point to require further TB testing as unscientific and unjustified. The Respondent indicated that he learned that the standard International classification requires further testing only for results greater than 10 MM for immigrants from Asian countries with high prevalence for TB, such as China. The Respondent felt that the USCIS rule exposed new immigrants to unnecessary x-ray testing, which has harmful effects on the human body. The Respondent noted that none of the twelve patients at issue in this case were shown to be active for TB, so the Respondent did not jeopardize the patients' health nor did he jeopardize the public health of the United States. The Respondent asked that the ARB dismiss all the charges that the Committee sustained.

#### ARB Authority

Under PHL §§ 230(10)(i), 230-c(1) and 230-c(4)(b), the ARB may review Determinations by Hearing Committees to determine whether the Determination and Penalty are consistent with the Committee's findings of fact and conclusions of law and whether the Penalty is appropriate and within the scope of penalties which PHL § 230-a permits. The ARB may substitute our judgment for that of the Committee, in deciding upon a penalty Matter of Bogdan v. Med. Conduct Bd. 195 A.D.2d 86, 606 N.Y.S.2d 381 (3<sup>rd</sup> Dept. 1993); in determining guilt on the charges, Matter of Spartalis v. State Bd. for Prof. Med. Conduct 205 A.D.2d 940, 613 NYS

2d 759 (3<sup>rd</sup> Dept. 1994); and in determining credibility, Matter of Minielly v. Comm. of Health, 222 A.D.2d 750, 634 N.Y.S.2d 856 (3<sup>rd</sup> Dept. 1995). The ARB may choose to substitute our judgment and impose a more severe sanction than the Committee on our own motion, even without one party requesting the sanction that the ARB finds appropriate, Matter of Kabnick v. Chassin, 89 N.Y.2d 828 (1996). In determining the appropriate penalty in a case, the ARB may consider both aggravating and mitigating circumstances, as well as considering the protection of society, rehabilitation and deterrence, Matter of Brigham v. DeBuono, 228 A.D.2d 870, 644 N.Y.S.2d 413 (1996).

The statute provides no rules as to the form for briefs, but the statute limits the review to only the record below and the briefs [PHL § 230-c(4)(a)], so the ARB will consider no evidence from outside the hearing record, Matter of Ramos v. DeBuono, 243 A.D.2d 847, 663 N.Y.S.2d 361 (3<sup>rd</sup> Dept. 1997).

A party aggrieved by an administrative decision holds no inherent right to an administrative appeal from that decision, and that party may seek administrative review only pursuant to statute or agency rules, Rooney v. New York State Department of Civil Service, 124 Misc. 2d 866, 477 N.Y.S.2d 939 (Westchester Co. Sup. Ct. 1984). The provisions in PHL §230-c provide the only rules on ARB reviews.

#### Determination

The ARB has considered the record and the parties' briefs. We affirm the Committee's Determination that Respondent failed to comply with Federal law governing the practice of medicine and that the Respondent failed to maintain patient records. We also affirm the Committee's Determination to dismiss all other charges. We overturn the Committee's

Determination to ban the Respondent from further employment with the USCIS Civil Surgeon Program. We vote to suspend the Respondent's License for three months and we stay the suspension in full. We affirm the Committee's Order that the Respondent complete successfully a continuing education course in medical record keeping and we vote to place the Respondent on probation for three years under the terms that we attach as the Appendix to this Determination.

We find that the Committee's Determination provided sufficient explanations for the Committee's decision to dismiss the fraud/false report and negligence charges. The Committee stated that they found the Respondent credible in his explanations about his conduct. The Committee believed that the Respondent made no willful falsifications and that the Respondent practiced according to accepted professional standards. The Respondent conceded that he failed to follow USCIS standards and that he failed to maintain records. Those concessions and other evidence in the record established that the Respondent failed to follow Federal law and that the Respondent failed to maintain records.

The Committee voted to ban the Respondent from employment with USCIS. Under PHL § 230-a(3), a Committee may limit a licensee to a specified area of practice. The ARB finds the ban on USCIS employment inconsistent with the License limitation authority under § 230-a(3) and we overturn that ban. We vote to suspend the Respondent for three months and we stay the suspension. We affirm the Committee's Order that the Respondent complete successfully a continuing education course in medical record keeping, which the Director of the Office for Professional Medical Conduct must approve. The Respondent shall have 90 days from the effective date of this Determination to complete the course. To assure that the Respondent has corrected his record keeping deficiencies, the ARB places the Respondent on probation for three years, under the terms that appear in the Appendix to this Determination.



**ORDER**

NOW, with this Determination as our basis, the ARB renders the following ORDER:

1. The ARB affirms the Committee's Determination that the Respondent committed professional misconduct.
2. The ARB overturns the Committee's Determination to ban the Respondent from USCIS employment.
3. The ARB affirms the Committee's Determination that the Respondent shall complete successfully a continuing medical education course in recordkeeping.
4. The Respondent shall complete the course within ninety days from the effective date of this Determination.
5. The ARB suspends the Respondent's License for three months and stays the suspension in full.
6. The ARB places the Respondent on probation for three years under the terms that appear at the Appendix to this Determination.

Peter S. Koenig, Sr.  
Steven Grabiec, M.D.  
Linda Prescott Wilson  
John A. D'Anna, M.D.  
Richard D. Milone, M.D.

In the Matter of Fung Michael Ngan, M.D.

Linda Prescott Wilson, an ARB Member concurs in the Determination and Order in the  
Matter of Dr. Ngan.

Dated: 15 August 2016

  
Linda Prescott Wilson

In the Matter of Fung Michael Ngan, M.D.

Peter S. Koenig, Sr., an ARB Member concurs in the Determination and Order in the  
Matter of Dr. Ngan.

Dated: July 15, 2016

A black rectangular box redacting the signature of Peter S. Koenig, Sr.

Peter S. Koenig, Sr.

In the Matter of Fung Michael Ngan, M.D.

Steven Grabiec, M.D., an ARB Member concurs in the Determination and Order in the  
Matter of Dr. Ngan.

Dated: 8/4/ 2016

  
Steven Grabiec, M.D.

In the Matter of Fung Michael Ngan, M.D.

Richard D. Milone, M.D., an ARB Member concurs in the Determination and Order in  
the Matter of Dr. Ngan.

Dated: July 14, 2016

  
Richard D. Milone, M.D.

In the Matter of Fung Michael Ngan, M.D.

John A. D'Anna, M.D., an ARB Member concurs in the Determination and Order in the  
Matter of Dr. Ngan.

Dated: July 15, 2016

  
John A. D'Anna, M.D.

## Appendix

### **Terms of Probation**

- 1. Respondent's conduct shall conform to the moral and professional standards of conduct in his profession and in governing law. Any act of professional misconduct by Respondent as defined by New York Education Law §§ 6530 or 6531 shall constitute a violation of probation and may subject Respondent to an action pursuant to New York Public Health Law § 230 (10) or (19), or both.**
- 2. Respondent shall remain in continuous compliance with all requirements of New York Education Law § 6502, including but not limited to the requirements that a licensee shall register and continue to be registered with the New York State Education Department (except during periods of actual suspension) and that a licensee shall pay all registration fees. Respondent shall not exercise the option provided in New York Education Law § 6502(4) to avoid registration and payment of fees.**
- 3. Respondent shall provide to the Director, Office of Professional Medical Conduct (Director), Riverview Center, Suite 355, 150 Broadway, Albany, New York, 12204, at least every six months and as otherwise requested, or within thirty days of any change in the information, the following information in writing:**
  - a. a full description of the Respondent's employment and practice;**
  - b. all professional and residential addresses and telephone numbers within and outside of New York State;**
  - c. any and all information concerning investigations, arrests, charges, convictions or disciplinary actions by any local, state, or federal agency;**
  - d. any and all information concerning investigations, terminations, or disciplinary matters by any institution or facility.**
- 4. Respondent shall provide to the Director copies of all applications relating to the practice of medicine, including but not limited to, privileges, insurance, and licensure, in any jurisdiction, concurrent with their submission.**
- 5. Respondent shall cooperate fully with, and will respond within two weeks, to Office for Professional Medical Conduct (OPMC) requests to provide written periodic verification**



of Respondent's compliance with these terms of probation. Upon the Director's request, Respondent shall meet personally with a person designated by the Director.

6. The probation period shall toll when Respondent is not engaged in active medical practice in New York State for a period of thirty consecutive days or more. Respondent shall notify the Director, in writing, if Respondent is not currently engaged in, or intends to leave, active medical practice in New York State for a consecutive thirty day period. Respondent shall then notify the Director again at least fourteen days before returning to active practice. Upon Respondent's return to active practice in New York State, the probation period shall resume and Respondent shall fulfill any unfulfilled probation terms and such additional requirements as the Director may impose.
7. The Director, or his designee, may review Respondent's professional performance. This review may include but shall not be limited to:
  - a. A review of office records, patient records, hospital charts, and/or electronic records;
  - b. Interviews with or periodic visits with Respondent and staff at practice locations or OPMC offices.
8. Respondent shall maintain complete and legible medical records that accurately reflect the evaluation and treatment of patients, and contain all information required by State rules and regulations concerning controlled substances.
9. Respondent shall comply with these Terms of Probation, and shall bear all associated compliance costs. Upon receiving evidence of noncompliance with or a violation of these terms, the Director may initiate a violation of probation proceeding, and/or any other proceeding authorized by law, against the Respondent.